PETITION FILED
MAR 2, 1983

NO. 82-502
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

-against-

JOSEPH DURIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE and BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT ON BEHALF OF Local 1291, Local 1694, Local 1566, Local 1884, Local 1332, Local 1242, and Local 1883, International Longshoremen's Association, AFL-CIO

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Local 1291, Local 1694, Local 1566, Local 1884, Local 1332, Local 1242 and

Local 1883, International Longshoremen's Association, AFL-CIO, respectfully move the Court for leave to file a Brief Amici Curiae in support of Respondent in the within matter, and in support thereof state as follows:

1. Movants are local unions representing longshoremen employed in the Port of Greater Philadelphia, which encompasses the ports of Philadelphia, Pennsylvania, Camden, New Jersey, and Wilmington, Delaware. Movants' members will be adversely affected if the decision of the United States Court of Appeals for the Sixth Circuit in the instant case is reversed, and, therefore, seek to file this Brief Amici Curiae in support of respondent.

2. Counsel for respondent has advised that he does not oppose the granting of this motion. However, counsel for petitioner had advised that

he does oppose the granting of this motion.

3. Movants believe that there are not less than thirty pending law suits brought by movants' members which will be affected by this Court's decision in the instant case, in addition to future law suits which may be brought by movants' members.

4. Movants desire to file a Brief Amici Curiae in support of respondent in this matter in order to place before the Court the deposition testimony of John J. McTaggart, Deputy Commissioner for the Third Compensation District for the United States Department of Labor, who is charged with administering the Longshoremen's and Harbor Workers' Compensation Act in the States of Pennsylvania, Delaware and West Virginia. Mr. McTaggart's deposition was taken in litigation which

involved the same issue presented by the instant case and sets forth in detail the procedures followed by the United States Department of Labor insofar as they relate to the issues involved in the instant case.

5. More specifically, Mr. McTaggart's deposition establishes that the Department of Labor has procedures available under which a stevedore employer who may desire the entry of a formal compensation award, may obtain such an award on request without stopping the payment of compensation benefits to an injured longshoreman.

6. In addition, in his deposition, Mr. McTaggart discusses the application of certain penalty provisions contained in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§914(e) and (f), and demonstrates that the interpretation of the statutory term payment of compensation "without an award" as

being the payment of compensation "under an award" would have disastrous consequences for the stevedoring industry.

7. Counsel for movants has reviewed the briefs of petitioner and amici curiae thus far filed in this case, and represent to the Court that they do not contain adequate factual information with respect to the foregoing points which, it is believed, are crucial to this Court's determination of the issues presented by this case.

8. The proposed Brief Amici Curiae and the deposition of Mr. John J. McTaggart are submitted herewith.

WHEREFORE, movants pray the Court to grant leave to file the within Brief Amici Curiae.

Respectfully submitted,

Charles Sovel
Counsel for Amici Curiae

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BRIEF AMICI CURIAE

SUMMARY OF ARGUMENT

1. An employer desiring the entry of an "award in a compensation order" for purposes of commencing the running of the six month period prerequisite to a statuory assignment under 33 U.S.C. §933(b) may obtain such an award upon request to the office of the Deputy Commissioner for the appropriate compensation district. It is not necessary for the employer to refuse or terminate the payment of benefits in order to obtain such an order. Rather, all that an employer desiring the entry of a formal compensation order need do is to file a Notice of Controversion while continuing to pay compensation benefits, following which an order can be entered by the Deputy Commissioner on an agreed statement of facts without the necessity

of a formal hearing or delay in the payment of benefits.

2. Treating the payment of compensation "without an award" as if it were payment of compensation "under an award in a compensation order" would have disastrous consequences for the stevedoring industry and other employers required to pay compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Longshoremen's and Harbor Workers' Compensation Act contains specific provisions imposing penalties on employers where compensation benefits are not paid when due, see 33 U.S.C. §§ 914 (e) and (f). Where compensation is being paid "without an award", and the payment of compensation benefits is terminated by the employer, and, subsequently, it is determined that the payment of benefits should not have been terminated, then,

under Section 14(e) of the Act, 33 U.S.C. §914(e), the employer is subject to a 10% penalty on the payments which were withheld, but this penalty is not imposed where a notice of controversion has been filed by the employer, or the failure to pay was due to conditions beyond the employer's control. However, where compensation is payable under the terms of "an award in a compensation order", and payment is not made when due, and it is later determined that compensation should have been paid, then, under Section 14(f) of the Act, 33 U.S.C. §914(f), there is imposed an additional penalty of 20% of the amount of compensation due and this penalty is not waivable.

An employer paying compensation "without an award" who believes that compensation no longer is due, either

because of the absence of medical evidence of disability, or because an examining physician has determined that the employee is able to return to work, may terminate the payment of compensation benefits and file a Notice of Controversion. In such circumstances, if it is later determined that the compensation benefits should have been paid, then no penalties are imposed on the employer. However, if under the same circumstances, compensation were being paid under "an award in a compensation order", the employer would be subject to the 20% penalties provided for in Section 14(f) of the Act, 33 U.S.C. §914 (f). The statutory language clearly contemplates a distinction between the payment of compensation "without an award" and the payment of compensation "under an award in a compensation order". Abolishment of this distinction, and the

treatment of the payment of all compensation as if it were payment "under an award in a compensation order" would create a nightmare for employers subject to the Act as any termination of the payment of benefits, even the termination of payments in the good faith belief that the employee no longer was entitled to benefits, would subject the employers to the risk of having to pay the 20% penalty provided in Section 14(f) of the Act.

3. The argument made in the Brief Amici Curiae in support of petitioner filed on behalf of various shipping companies to the effect that the filing of papers supporting the payment of compensation without an award should be regarded as the payment of compensation under an award in order to comply with Sections 19(b) and (c) of the Act, 33 U.S.C. §§919(b) and (c), is based on an

erroneous and misleading interpretation of the Act. The provisions of Section 19 of the Act do not apply to every claim for the payment of compensation benefits, but rather only apply in those instances where the right to receive compensation benefits is controverted by the employer and the employer is refusing to pay. Moreover, Section 19 applies only to those situations where a claim has been referred to an Administrative Law Judge. Counsel for the Amici Curiae have overlooked in their brief that the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act amended Section 19 by adding the provision now identified as Section 19(d) of the Act, 33 U.S.C. §919(d), which transferred the functions of the Deputy Commissioner under that section to hearing examiners (Administrative Law Judges) hearing disputed claims. Contrary

to the argument being advanced by the shipowners in their Amici Curiae Brief, Section 19 of the Act does not require the entry of an award in every case.

POINT I

AN EMPLOYER PAYING COMPENSATION BENEFITS MAY OBTAIN THE ENTRY OF AN AWARD UPON REQUEST WITHOUT HAVING TO TERMINATE THE PAYMENT OF BENEFITS.

The contention that the payment of compensation without an award should be treated as the payment of compensation "under an award in a compensation order" so as to trigger the running of the six month period for a statutory assignment under Section 33(b) of the Act, 33 U.S.C. §933(b), was first raised in Liberty Mutual Insurance Company v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977). There the Court, apparently without being aware of the procedures available under the Act, assumed that the only way that the entry

of a formal order could be obtained would be by the employer terminating the payment of compensation benefits and forcing the matter to a formal hearing. Thus, in holding that the payment of compensation without an award, accompanied by the filing of the appropriate documents evidencing such payment, could be treated as the payment of compensation under an award, the Court stated, 564 F.2d at 1103:

> "We hold that the documents set forth in footnote 10 above constituted sufficient affirmative action and a determination by the deputy commissioner granting benefits to Melson so as to constitute an 'award' of benefits in a compensation order under 33 U.S.C. §933(b) without the entry of a formal award. . . .
>
> "We believe this result is a logical one. A stevedore-employer should not be required to controvert every claim for compensation under the Act simply to insure the entry of a formal award in order to preserve the statutory

> "assignment and subrogation rights of the stevedore-employer and insurance carrier under 33 U.S.C. §§933(b) and (h). Such a requirement would frustrate the Act's time-honored purpose which was to eliminate the delay and expense incident to litigation, Wheeling Corrugating Co. v. McManigal, 41 F.2d 593, 595 (4th Cir. 1930), and cripple the congressionally explicit goal of prompt payment of claims that need not be controverted by employers."

This erroneous assumption that the entry of a formal compensation order could be obtained only by terminating the payment of benefits and bringing the matter to a formal hearing was carried through by the Fourth Circuit in its decision in Simmons v. Sea-Land Services, Inc.,676 F.2d 106 (4th Cir. 1982). There, in adopting a rule that the payment of compensation without award, coupled with the filing of a notice by the Deputy Commissioner that payments have been initiated, and the longshoreman's

acceptance of the payments, triggered the running of the six month period under Section 33, the Fourth Circuit stated, 676 F. 2d at 109:

> "We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time." (Emphasis supplied)

This assumption that an employer can obtain the entry of a formal compensation award only by withholding payments and bringing the matter to a formal hearing is incorrect. On the contrary, there are procedures available under the Act by which an employer desiring a formal award can obtain its entry upon request without terminating the payment of compensation benefits. It was in order to place this procedure of record in another case in which the same argument

presented by the instant case was raised that the attached deposition of Mr. John J. McTaggart, Deputy Commissioner of Labor, initially was taken. In this deposition, Mr. McTaggart explans in detail the various procedures governing the administration of the Act and the various documents that are filed with the Department of Labor. In the course of the deposition, Mr. McTaggart was asked specifically whether an employer could commence the voluntary payment of compensation, file the form 206 evidencing the payment of compensation without an award, and then obtain the entry of an award (24a-25a).* Mr. McTaggart replied that such a procedure was available and that an order could be entered upon

* References are to pages in Mr. McTaggart's deposition which is attached hereto.

request simply by the filing of a Stipulation of Facts setting forth the terms under which compensation was being paid (25a-26a).

Indeed, the Regulations promulgated by the Department of Labor governing the administration of the Longshoremen's and Harbor Workers' Compensation Act specifically provide for the entry of such orders upon request. Thus, 20 C.F.R. 702.315(a) specifically provides:

> "(a) Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall, within ten days after conclusion of the conference, embody the agreement in a memorandum or within thirty days issue a formal compensation order, to be filed and mailed in accordance with Section 702.349. If either party requests that a formal compensation order be issued the deputy commissioner shall, within 30 days of such request, prepare, file and serve such order in accordance with Section 702.349. . . ." (Emphasis supplied)

It is thus apparent that the decisions in Ameta and Simmons, supra, are based on an erroneous understanding of the procedures available under the Act. It is also clear that an employer's desire to obtain the entry of a formal compensation order for purposes of 33 U.S.C. §933(b) would not impede the timely payment of compensation benefits to an injured employee.

POINT II

MAINTENANCE OF THE DISTINCTION BETWEEN PAYMENT OF COMPENSATION WITHOUT AN AWARD AND PAYMENT OF COMPENSATION UNDER AN AWARD IS ESSENTIAL TO THE ADMINISTRATION OF THE ACT'S PROVISIONS DEALING WITH THE IMPOSITION OF PENALTIES WHERE THE PAYMENT OF BENEFITS HAVE BEEN WITHHELD.

As previously noted, the principal argument raised in support of the contention that the payment of compensation "without an award" should be treated as

the payment of compensation "under an award in a compensation order" is that such an interpretation is necessary as an incentive to employers to pay compensation benefits promptly. This argument is disingenuous. There is absolutely no history whatsoever under the Act of employers withholding the payment of compensation benefits in order to obtain a statutory assignment of the employee's third-party cause of action. Indeed, the number of suits that have been brought where there has been an assignment probably can be counted on the fingers on one hand with several fingers left over.* The incentive for the prompt

*The only reported case where an employer exercised the right to bring suit would appear to be Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1964).

payment of compensation benefits lies in the Act's provisions for the imposition of penalties on employers who withhold the payment of benefits. These penalties are severe and there is no need to create any incentives on the employers other than those contemplated and enacted by Congress.

The penalty provisions appear in Sections 14(e) and (f) of the Act, 33 U.S.C. §§914(e) and (f). In these sections, the Act makes a distinction between the withholding of payment of benefits where compensation is being paid "without an award" and the withholding of benefits due under the terms of "an award". Section 14(e), 33 U.S.C. §914(e), deals with the payment of benefits "without an award" and provides as follows:

> "(e) If any installment of compensation payable without

> "an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 percentum thereof which shall be paid at the same time as, but in addition to, such installment unless notice is filed under subdivision (d) of this section, or unless such non-payment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment."
>
> Section 14(f), 33 U.S.C. §914(f)

covers the situation where the compensation was payable "under the terms of an award", and provides as follows:

> "(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percentum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review

> "of the compensation order making such award is had as provided in section 21 and an Order staying payments has been issued by the Board or court."

It can be seen that there are two major distinctions between Section 14(e) and Section 14(f). First, the penalty for the failure to pay compensation where it is being paid without an award is 10% while the penalty for the failure to pay compensation due under the terms of an award is 20%. Secondly, and more important, the imposition of the 10% penalty under Section 14(e) can be avoided by the filing of a Notice of Controversion under Section 14(d) of the Act, or can be waived by the Deputy Commissioner. The 20% penalty imposed by Section 14(f) for compensation due under an award can be avoided only by obtaining a stay issued by the Benefits Review Board or a Court while a matter is on

appeal. It is otherwise mandatory and nonwaivable.

The distinction between these two penalty provisions is discussed at length in Mr. McTaggart's deposition submitted herewith (18a-22a). In practical application, an employer who is paying compensation benefits to an employee normally would want to do so without an award. If the employer were to determine that compensation benefits should be terminated, for example by reason of the absence of medical evidence of disability, or because the employer's examining physician has determined that the employee is able to return to work, the employer simply files a Notice of Controversion and ceases the payment of benefits. If it is subsequently determined that benefits should not have been

terminated, the employer can pay the benefits up to date without penalty. However, if compensation were being made pursuant to an award, an employer seeking to terminate the payment of benefits for the same reasons, i.e., -- absence of evidence of disability or a report that the employee is able to return to work,-- would have to risk the imposition of the 20% penalty under Section 14(f) if the payment of benefits were discontinued.

Converting the payment of compensation without award into the payment of compensation under an award, which is the consequence of the position being argued by the shipowners, would have a disastrous effect on the employers who are paying compensation benefits, for then, in every case where the payment of benefits is discontinued, even in the good faith belief that such payments no

longer were due, the employer would be subject to the imposition of a 20% penalty which would not be waivable, should it later be determined that the employer erred in terminating the payment of benefits. In order to avoid such a consequence, the employers then would be compelled to file petitions with the Benefit Review Board for leave to terminate the payment of compensation in cases which were not even before the Benefits Review Board or an Administrative Law Judge. The paper work, expense and inconvenience that this would cause, in addition to frequent overpayment of benefits to employees, would cause incalculable damage to the employers covered by the Act and seriously impair the administration of the Act by the Department of Labor. When one realizes

the consequences to the employers of the position being argued by the shipowners, it is not surprising that no group representing the employers has come forward to assert the claim that they need a statutory assignment at an early date in order to press third-party claims on behalf of injured employees.

POINT III

SECTION 10 OF THE ACT, 33 U.S.C. §919 DOES NOT REQUIRE THE FILING OF A FORMAL COMPENSATION ORDER IN EVERY CASE, AND THERE IS NO ADMINISTRATIVE NECESSITY FOR TREATING THE PAYMENT OF COMPENSATION PAID WITHOUT AN AWARD AS IF IT WERE COMPENSATION BEING PAID UNDER AN AWARD

In the Amici Curiae Brief filed on behalf of various shipowners, the statement is made that §§919(b) and (c) of the Act, 33 U.S.C. §919(b) and (c), require the filing of a compensation order by the Deputy Commissioner in <u>every</u> case. The argument is then made that the

filing of the papers incident to the payment of compensation without an award should be treated as a compensation award for purposes of complying with §§19(b) and (c). This argument constitutes a gross misreading of the statute. First, the procedures set forth in §§19(b) and (c) apply only to those situations where the obligation to pay compensation is contested and a hearing must be held. Secondly, and more importantly, the 1972 Amendments to the Act transferred the functions of the deputy commissioner under §§19(b) and (c) to the hearing examiner (Administrative Law Judge) hearing a disputed claim. As a result, §§19(b) and (c) no longer apply to the office of the deputy commissioner. This is made clear by §19(d), which was added to the Act as

part of the 1972 Amendments, and which provides as follows:

> "(d) Notwithstanding any other provision of this Act, any hearing held under the Act shall be conducted in accordance with the provisions of Section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examined qualified under section 3105 of that title. All powers, duties and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, in the deputy commissioner with respect to such hearings shall be vested in such hearing examiners." (Emphasis supplied)

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

Charles Sovel
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800 Lafayette Building
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

ALONZO CUMMINGS : CIVIL ACTION

vs.

YANGMING MARITIME : NO. 80-1269
TRANSPORT CORP.

Philadelphia, Pennsylvania,
Wednesday, July 1, 1981

Pretrial examination of JOHN J. McTAGGART, held in the offices of Freedman & Lorry, P.C., 8th Floor, Lafayette Building, at 10:10 a.m., on the above date before Janice M. Leaman, a Notary Public and Registered Professional Reporter.

APPEARANCES:

FREEDMAN & LORRY, P.C.
By: CHARLES SOVEL, ESQ.,
Attorney for Plaintiff

RAWLE & HENDERSON
By: CARL D. BUCHHOLZ, III, ESQ.,
Attorney for Defendant

(It is hereby stipulated and agreed by and between counsel that filing, signing, sealing and certification be waived; and that all objections, except as to the form of questions, be reserved until the time of trial.)

. . .JOHN J. McTAGGART, being first duly sworn, was examined and testified as follows:

BY MR. SOVEL:

Q. Mr. McTaggart, you are employed by the United States Department of Labor?

A. Yes.

Q. What is your title?

A. I am a claims examiner.

They call us assistant deputy commissioner, is my title.

Q. Are you specifically designated as an assistant deputy commissioner for a particular region?

A. No.

Not a region. A district. District 3, which comprises three states, Pennsylvania, West Virginia, and Delaware.

Q. As the assistant deputy commissioner for that district, what, in general, are your duties?

A. Well, we administer the longshoring act, the Longshoreman and Harborworkers Compensation Act.

We monitor claims. We get involved with disputed claims. All claims are processed through our office. We receive reports.

In general, we really monitor claims under the Longshore Act.

Q. In what district does New Jersey fall?

A. It is District 2.

Q. Where is that headquartered?

A. It is in New York City.

Q. Now, is there a procedure by which a claim can be transferred from one district to another?

A. Normally, yes, if an interested party requests the transfer.

The most common reason for the transfer is the claimant living in another area.

Q. Now, to clarify the record in this particular case, this case involves an accident that occurred in New Jersey.

That file was transferred at the claimant's request from the second district to the third district?
A. That is correct.
Q. Now, I would like to ask you a series of questions dealing with the procedures for handling claims under the Act. These questions are addressed to the general procedure for handling them, not what occurred in this specific case.

After we go through those general questions, I will ask you some questions about this particular case; do you understand that?
A. Yes.
Q. When an accident occurs which falls within the coverage of the Longshoreman's Act, what is the procedure that an employee follows to claim his compensation benefits?
A. All right. In a routine case I will try and explain what happens.

Normally, an injured employee is injured. He gives notice to his employer of the injury. The employer has notice. The employer has to provide treatment. The employer must authorize

free choice physician. The claimant is treated.

The employer has 10 days to file a first report of injury, which is a form 202. The employer will file this report giving the facts of the injury as they are related to them with the notice.

There are forms prescribed that an employee can give notice to the employer in writing. There is also another form prescribed that the employee can choose his own physician, and the employer would authorize the physician. The physician then is notified by the form to provide information back to the employer or insurance carrier so that they can start picking up the payments.

In a routine case, normally payments are made within 14 days.

Q. Now, when you are referring to payment made within 14 days, you are referring to a payment of Workmens Compensation benefits?

A. Right.

Q. That is a wage benefit?

A. Yes.

Q. Which is computed at two-thirds of the employee's average weekly rate?
A. That's correct.
Q. If that employer does not make that payment voluntarily, what procedure does the employee follow to obtain the payment of compensation benefits?
A. Well, the employee would file a claim, which is a form 203.

We would receive it, serve it on the employer. If there was additional information needed, such as medical evidence or what have you, we would request it prior to scheduling an informal conference. We would obtain the employer's position prior to the conference.

If there was still an impasse or dispute, we would then bring the parties in and try to resolve it through an informal proceeding.
Q. Let me stop you there.

When the employee files his Form 203, do you then transmit that to the employer?
A. Yes.
Q. Does the employer file what is, in effect, an answer to the 203?
A. Yes.

Q. Does that form have a number?
A. 215.

It is an LS 215, answer to employee's claim.

The answer to employee's claim is not a mandatory form with regard to any penalties.

Maybe I should backtrack. An employer who has knowledge of an injury must do one of two things within 14 days, either pay the claim or controvert it. If they are going to controvert the claimant's entitlement to compensation, they would file Form 207 which is a notice of controversion.
Q. Do you have with you a blank Form 207?
A. No, I don't.
Q. What does that form normally contain?
A. Well, it basically --

MR. BUCHHOLZ: Which form, 207?
BY MR. SOVEL:
Q. 207.
A. It basically contains -- it is, more or less, I like to use the term that, "We are not going to pay you, and here is the reason we are not."

It is a form that will specifically tell the reasons why the employer is controverting the claimant's entitlement. We will get a number of them just simply because the medical evidence has not been received to date or something like that.

Q. The reason given is no medical evidence?

A. Yes.

If they are going to raise a jurisdictional defense. So they really outline the reasons why they are not paying.

Q. To keep this in the logical order that I wish to for this deposition, if the employer has filed nothing, then the employee must file the Form 203, which is his claim for compensation benefits?

A. Correct.

Q. You forward that to the employer; is that correct?

A. Or responsible carrier.

Q. Or the carrier?

A. Yes.

Q. If it is an insured situation?

A. Yes.

Q. They may or may not file an answer to that form?
A. Yes.
Q. Is that correct?
A. We provide them with the forms. But there is no penalty if they don't.
Q. The form that you provide them with is the 215?
A. 215.
Q. If they still do not pay compensation benefits, what is the next step followed by your office?
A. We would schedule an informal conference.
Q. Before whom is the informal conference scheduled?
A. In my district, before myself or my claims examiner.

I have one claims examiner in Workmens Compensation.

Q. Working under you?
A. Yes.
Q. Is there a form that is issued following such a conference?
A. Yes.
Q. What is that form?
A. Well, they are called memorandum of informal conference.

It can be done on a formal or a narrative. It need not be -- we can do it by using the form of narrative. Mostly, we used to do narratives. But recently, due to the volume, we do use Form 280. And I do have a copy of Form 280. It is basically a memorandum of conference form. I hope I have Form 280.

MR. SOVEL: And may we have marked as a sample a blank Form 280 which is the form which is entitled memorandum of informal conference?

I ask that that be marked as P-1 of this date.

(Whereupon, a blank memorandum of informal conference form, was marked as Exhibit P-1 for identification.)

BY MR. SOVEL:

Q. Now, if following that conference the employer still declines to commence the payment of compensation benefits, what is the next step?

A. Well, the examiner or other person conducting the informal conference will, after getting development in the case -- normally, you need one informal confer-

ence in the case. You develop the case prior to scheduling it.

Once you get sufficient evidence, or when you feel the parties have reached a situation where they are not going to go any further, a recommendation is made. Pending the recommendation, we are given 14 days to respond, all the parties, to the recommendation, at which time if it is still at impasse or one party at interest will not comply with the recommendation, the moving party -- this is normally the claimant -- must request a formal hearing and submit what is called a prehearing statement or LSAT.

Q. With respect to that Form 280, the memorandum of informal conference, there is a space in that form where the person conducting the hearing makes a recommendation as to whether compensation should be paid or not paid, whatever may be --

A. Whatever the issue.

Q. Whatever the issue is. Then you allow the parties 14 days to determine if they will comply with that recommendation?

A. Yes.

Q. Then, if there is no compliance with the recommendation, it then becomes incumbent on the party seeking relief to request a further hearing?

A. Formal hearing.

Q. Is that correct?

A. That's correct.

Q. That is called a formal hearing?

A. Formal hearing.

Q. That is before an administrative law judge?

A. Yes.

Q. Now, at a hearing before an administrative law judge, evidence is taken, is it not?

A. Yes.

Q. Normally, the administrative law judges are dispatched from Washington?

A. The chief judge. Yes.

My referrals go to the chief judge in Washington, D.C., who assigns the administrative law judge to the case.

Q. As a result of the hearing before the administrative law judge, what decision, or what action, does he take?

A. Well, once he --

MR. BUCHHOLZ: Objection.

I am not sure there is any foundation here that John has personal knowledge of that.

BY MR. SOVEL:

Q. Are you familiar with the procedures before the administrative law judge?

A. Yes.

Q. Does the administrative law judge --

MR. BUCHHOLZ: Note my objection.

MR. SOVEL: Okay.

BY MR. SOVEL:

Q. -- issue decisions?

A. Yes.

Q. Does he issue awards?

MR. BUCHHOLZ: Objection.

A. He issues decisions and orders.

BY MR. SOVEL:

Q. What may be encompassed within a decision and order?

A. Well, the only -- it is -- the issues that we referred to are resolved by his hearing.

He makes a decision which is transmitted back to our office. Once we refer a case to the ALJ, it is out of our jurisdiction. We have to wait. We cannot act unless there was another

issue that we did not address. We could still have an informal conference even though a hearing is being conducted on another issue.

Q. Okay.

A. But once we transfer it out on those issues, the case is out of our hands. It is in the hands of the administrative law judge.

Once the administrative law judge holds his hearing and issues a decision and order, he sends the entire record back to my office. I am the custodian of the records. At that time I must then serve the order on the parties. Once I have received it -- and we try to get the order served within the same day it is received.

Q. Right.

A. Basically, we will prepare a certificate of filing and service and make service on all the interested parties.

At that point, this triggers the possible penalty provisions under Section 14E or F. I forget which letter it is. But the order must be complied

with once we file and serve it upon the parties within 10 days.

Q. What are the penalty provisions to which you are referring?

A. If they do not make payments within 10 days of the filing of an order, there is a 20 per cent in addition to the amount due and payable.

Q. 20 per cent additional payments in the payment they must make?

A. No.

Q. 20 per cent what?

A. The amount they have not paid in accordance with the order,

I want to add one thing: our filing triggers the appeal date. The interested parties in the case would have 30 days from the date of filing in our office -- in the office of the deputy commissioner to file their appeal with the Board.

Q. Now, going back in time in this procedure, if at any time before that order is filed by your office after the administrative law judge hearing -- if at any time the employer agrees to the payment of compensation benefits, what procedure is followed?

A. Well, if they voluntarily pay?
Q. Yes.
A. Well, if they didn't ask for an order, they would just simply voluntarily pay and file Form 206 showing the total payments.
Q. What is Form 206?
A. 206 is a form we use to provide to employers to advise us that compensations are being paid without award.

It has specific information such as the date of injury, when the date of disability began, the average weekly wage, the compensation rate, and the date of the first payment.
Q. Do you have a Form 206 with you?
A. Yes.

In fact, I have two. I have three.
Q. We are only going to have one marked.

MR. SOVEL: I will ask to have marked as P-2 a form of payment of compensation without award.

(Whereupon, a form of payment of compensation without award, was marked as Exhibit P-2 for identification.)

BY MR SOVEL:

Q. Who files this form?

A. Well, it is required that an employer or carrier, an authorized employer or carrier, provide it to us when they make their first payment.

There is also instructions on it that they are to send to the claimant, the injured employee who is disabled, a copy with the first payment.

Q. This form is entitled payment of compensation without an award.

What is the distinction, as you understand it, between this and payment of compensation with an award?

MR. BUCHHOLZ: Objection.

MR. SOVEL: Or under an award.

MR. BUCHHOLZ: Objection.

MR. SOVEL: You can answer.

A. Well, it is simply -- I don't know if it can be clearly stated. There is no award. There is no order to pay. There is no voluntary payment on the employer's part.

BY MR SOVEL:

Q. Okay.

A. With an award it is either an order by the deputy commissioner where he has

issued an award -- he can still issue awards, but he must have total agreement of the parties on all issues.

What we require in a case where I would be issuing an award would be a stipulation signed by the parties showing me the total agreement they have. We would also check that against the information in the case file, and then we will proceed to issue an award of compensation -- or, if an administrative law judge issued a decision and order.

Q. Do you have a form that is used for payment with or under an award?

A. No, we don't.

Q. How do you handle it?

A. Well, when I normally check it, I request employers when an award is issued, to submit a Form 206, which is a suspension notice, and modify it a bit, or just give me a narrative telling me the amounts they have paid and the date of payment.

Q. Then what do you issue?

A. Nothing.

We confirm that payments are being made. We would take action if payments were not being made.

Q. Now, if an employer pays compensation without an award and files the Form 206 and it desires to stop the payment of compensation because, as an example, it feels that the employee is no longer disabled, what procedure does it follow?

A. Well, I will go over that: basically, what they would do, or technically what they should do, is suspend payments, file Form 206 advising this that they have stopped payment, and also file Form 207, notice of controversion.

Q. If they follow that procedure, are they subject to a penalty for failure to pay compensation if it later is determined the employee was entitled to compensation?

A. Well, it would sort of be discretionary.

In other words, if they had a valid reason for suspending such as a failure to have medical evidence provided or what have you, we could excuse the -- the deputy commissioner could

excuse in a voluntary situation any penalty.

In other words, if the reasons for their controversion was the fact that they had not received medical evidence and they had paid the claimant for two months without medical evidence in the file and they suspended payments, and they were having difficulty -- or the claimant was not providing the medical evidence required -- and it worked out that this medical evidence came in later, naturally, we would excuse the failure to pay within the time frame.

Q. When you say excuse, you mean you would excuse the payment of penalties?

A. Yes.

Q. Now, if the compensation was being paid under an order or under an award and the employer ceased the payment of compensation for the same reason, didn't have medical information -- or just ceased the payment of compensation -- what would be the situation with respect to penalties?

A. Well, upon application, payments must be made within -- the first payment

within 10 days; and then, every 14 days thereafter.

If, under an award, the employer or carrier failed to provide that, by application of the claimant we would have to issue a 20 per cent penalty.

Q. There is no discretion to waive that penalty?

A. No.

I would have to investigate the claim. I could hold a hearing to determine the facts in the case that, in fact, the payments were not made.

Once I determined that, normally -- I think I have only done this once or twice -- the employer may admit this to me that they did not pay it within the time frame. If I had those facts that I could establish that, I would issue a default order.

Q. Am I correct that one of the distinctions between payment under an award and payment without an award is that if payment is improperly terminated when it is being made under an award, you have no discretion to waive the penalty provisions?

A. No.

Not when the facts indicate the payments were not made and the claimant applies for the --

Q. Penalties?

A. -- penalties.

Q. But the employer could stop for a valid reason if the payment was being made without an award?

A. Yes.

They can stop at any time, technically. They are always subjecting themselves to penalties.

There is really -- we couldn't enforce a 10 per cent penalty anyhow. We could recommend it.

Let's say we did recommend it at an informal conference that the employer pay a 10 per cent penalty and they declined to do it. And they paid all the compensation due the claimant. The claimant would still have to request a hearing and get a decision and order to start triggering the serving of the order, at which time, if they didn't comply with the ALJ's formal order to pay the penalty, we would have to go through the default procedure.

Q. Now, if an employer wanted to have payments made under a award, wanted to have an order or an award issued without, however, stopping the payment of compensation benefits himself -- or the employer stopping himself -- how would he go about getting an award issued?
A. Well, he would request it.

Basically, he would have to provide to us -- I insist on a stipulation of facts of the interested parties at which time we would go over the information in the case file.

If all the stipulations are accurate, we would issue an order, an award of compensation. But we must have a stipulation signed by all the interested parties.

Q. Now, does the filing of a Form 206, a payment of compensation without award, bind the employer to indefinitely continue the payment of compensation benefits?
A. No.
Q. Does it bind him to petition to terminate it, or may he just file the notice of controversion?

A. Well, it is a voluntary payment. They can do whatever they want at any time.

They could stop paying. They just subject themselves to the penalty provisions as they are outlined.

Q. So we are clear on that, that penalty provision is a waivable penalty provision by you?

A. Yes.

Q. By you, I mean by the deputy commissioner?

A. If the facts of the case indicate that their suspension and the timely controversion of the case was correct.

Q. If they were paying under an award, you could not waive the --

A. Technically, they cannot suspend.

Q. They cannot suspend?

A. No.

We could issue a default order. We would have a mechanism for making them pay.

Q. Now, an employer could commence the voluntary payment of compensation and file the 206 payment of compensation without award. Then. if he wished to have an award, could ask you to issue

one and obtain a stipulation of facts and you would issue one?
A. Yes.

The only problem -- and I have never seen it -- would occur if the claimant refused to sign the stipulation of fact. Then, what we would have to do, is refer the case to the ALJ for hearing and an ALJ would have to issue the order. I couldn't issue it.
Q. But absent the employee's refusal to agree to the fact that he is entitled to compensation, there is no problem issuing an award?
A. No, other than, again, confirming the information represented was accurate by the medical evidence in the case file, what have you.
Q. Now, under the procedures followed by the Department of Labor, who has the authority to issue awards or orders?
A. The deputy commissioner.
Q. The deputy commissioner only?
A. Only.
Q. The claim examiners?
A. No.

Only -- again, my formal title is claims examiner. But I am called

assistant deputy commissioner. I am one grade above the examiner. I supervise and manage the entire office.

I have delegated authority directly from the director to act as the deputy commissioner.

Q. But the claims examiner under you does not have that same delegated --

A. No.

He could not issue an award.

Q. Was any award ever issued in this case?

MR. BUCHHOLZ: Objection.

THE WITNESS: In the Alonzo Cummings --

MR. BUCHHOLZ: For the record --

MR. SOVEL: Yes.

MR. BUCHHOLZ: -- I don't think that is a fair question to ask Mr. McTaggart. That is a legal question. I think he should be so advised.

If you want to ask him if a formal award pursuant to one of the stipulations was ever issued, I don't have any objection to that.

MR. SOVEL: Okay.

MR. BUCHHOLZ: Okay.

MR. SOVEL: I will ask that question. But I am not agreeing altogether with your objection as being an appropriate one.

MR. BUCHHOLZ: Fine.

BY MR. SOVEL:

Q. Was any order or award issued by your office, by you as deputy commissioner, for this district in this case?

A. In the Alonzo Cummings case?

Q. Yes.

A. No.

Q. Now, you have brought with you, pursuant to my subpoena, a copy of the entire file in the Cummings case.

A. Yes, I have.

Q. Can you, briefly, by running through it, specify what the steps were and what papers were filed in the case?

By the way, are those papers in chronological order?

A. They are in the order that they put them in the file.

Q. Okay.

A. There may be some dates varying.

What we normally do initially when we get the case file made up -- again, this was made up in New York, not

my district initially, and then transferred to me -- is we will keep the 202 on the bottom and then work up chronologically as forms come in.

Q. Would you, then, proceed to go through the file from the filing of the 202 and tell us each step that occurred, if you can?

A. Well, there is a Form 202 dated June 6, 1979, in the case file.

I don't know the exact date it was received. I cannot make out the date it was received. The next form is Form 206.

Q. Which is what?

A. Payment of compensation without award.

This is dated June 13, 1979; was received June 18, 1979, in New York.

The additional information is medical reports from various treating physicians. There is a request for additional medical reports in the file. There is another request from our office for status.

Basically, what is happening is the file is being monitored by the claims examiner.

Am I going too fast?

Q. No. Go ahead.

Was there --

A. There was a suspension of compensation. There is a Form 208. That's dated February 15, 1980, indicating payments were suspended as of February 13.

The employer outlined the periods of compensation they paid.

They also noted that they felt they had made an overpayment.

Q. Okay.

A. There is a Form 203, which is a formal claim for compensation, dated March 12, 1980.

There is a retainer by your firm.

There is also a March 26, 1980, letter from the claims examiner in New York transferring the file to us, advising you -- this is our transfer form. We received the claim on April 15 of 1980 and requested to answer the claim.

An informal conference was scheduled by John DeLuca, the claims examiner, April 15. The informal

conference was to be held April 22, 1980.

There is a Form 280, which is a memorandum of informal conference.

Q. What was the recommendation of the claims examiner at that time?

A. On Page 2, temporary total disability compensation from February 8, 1980, to date and continuing, based on a compensation rate of $257.26 per week.

Q. By the way, is Mr. DeLuca authorized to issue orders or awards under the procedures of the Department of Labor?

A. He is a claims examiner.

Q. That means he is not authorized?

A. Only the deputy commissioner.

Q. Now, was that recommendation complied with?

A. Yes.

Q. What is the next form that you have?

A. We received the 208 form as indicating that payments continue at $257.26 per week, pending Dr. Simon's findings.

Q. Okay.

A. The payments were resumed approximately April of 1980.
Q. Now, that's a -- what form is that?
A. It is a 280 form. It is a suspension notice form.

In this type of situation, what we want to do is to see all the periods of temporary total. And this is a way -- they do note the instruction we normally give carriers and employer that if payments continue, please let us know in Item 11. In this one, that's what they do.
Q. So, while they are using the suspension form, it was really a notification of continued payments or --
A. Or acceptance.
Q. That operated as acceptance of the recommendation; is that correct?
A. Yes.

As far as we are concerned, it did. The payments were resumed.

Basically, we are down through their medical reports being received. The claim was referred to vocational rehabilitation adviser. Compensation was again suspended in December of 1980. Then payments were resumed in February

of 1980. The claimant was brought up to date.

The last notification about the situation was in February of 1981. "Payments are continuing."

Then we finish up with the notice of the deposition and medical reports that we received June 24.

Q. Now, at any time in this proceeding, as reflected in the file, did the employer ever request the issuance of an award?

A. No one did.

Q. If the employer did, could one have been issued?

A. Only with the stipulation from the claimant.

Q. That stipulation would have had to have been what?

A. An in-writing stipulation.

We have a form, if you want to see it.

We have two forms that we use. One is called exactly -- I hope I have two forms. Well, we have a stipulation of fact form. I don't know if I provided you with a copy of that or not.

Q. I don't have it in front of me.

A. Okay. But there is a stipulation of fact form. I can give it to you.

It, basically, is a form that can almost cover a general situation. We don't require that you use the form. We want a document of --

Q. What is the information that has to be stipulated to?

A. The injury, the disability, the period of disability, the average weekly wage, and notice was complied with; the extent of the various disabilities.

Q. Well, the employee in that situation would only disagree with the stipulation if he felt that either the wages were not enough, or something that he disagreed with in terms of the payment of compensation?

MR. BUCHHOLZ: Objection. That is not -- Mr. McTaggart is not in a position to answer that, to know what the employee would object to. I don't think it is a proper question.

BY MR. SOVEL:

Q. If the employee disagreed with the employer's statement of what his average

weekly wage would be, he can assert this --

A. That is a joint stipulation. So, obviously, if one of the two sides does not agree, we are not going to receive it.

Q. Okay.

A. You know, it would be -- it could be one or all 10 items.

Q. If the employee refuses to agree, then the employer can file a notice of controversion and get an award?

A. Yes.

If, in fact, the employer is paying based on what they feel to be represented and the only problem is that the claimant will not sign the stipulation so that we can issue an order, they will have to request a formal hearing to get their order.

If that is really not going to make anything different, if the claimant is being paid the proper compensation and being provided medical treatment and just refuses, I can't issue an order unless I can make a showing that the parties are in agreement on all issues. I would just have to refer it to an ALJ

and have him conduct a hearing. We can't hold hearings.

Q. The employer is in a position to force the issuance of an award it if wishes to?

A. The employer is an interested party and can request a hearing.

I have never had that occur.

Q. Right. Based on your experience and your knowledge of the procedures in the Act, if an employer is paying compensation at the correct amount, would it want to have an award against it?

MR BUCHHOLZ: Objection.

MR. SOVEL: Okay.

A. All right. Most payments are made voluntarily without award.

Most of the cases we get do not require an award. The Act mandates voluntary payments without award.

Q. Now, would you give me back my last question, please?

(Whereupon, the previous question was read by the Court Reporter.)

BY MR. SOVEL:

Q. Would the employer's rights be affected by paying the compensation

under award as compared to not under an award?

A. No.

There would be the same situation occurring. The only problem that would happen if an employer had an award is that they can't stop paying until they modify the award that they are under.

Q. They then become subject to those penalty provisions that you related to earlier?

A. Yes.

MR. SOVEL: Cross-examination.

MR. BUCHHOLZ: I am not sure I would call it cross-examination.

BY MR. BUCHHOLZ:

Q. Mr. McTaggart, I believe you said that the Longshore Act for the payment of compensation mandates voluntary payment without award; is that correct?

A. Yes.

Q. If an employer is aware that a longshoreman is injured on the job and is being treated for these injuries, the Act is so set up that the employer is expected to begin voluntary payment of compensation; isn't that right?

A. Yes.

Q. Is there, in fact, any basis for an employer who knows that the longshoreman is injured in the course and scope of his employment and is being treated for injuries arising thereof to controvert a claim?

A. No.

Q. In fact, if an employer controverted a claim which it admittedly knew had arisen during the course and scope of a longshoreman's employment, and that the longshoreman was receiving treatment for those injuries, the employer would be subject to penalties?

A. If they did not make the payment.

They can controvert all they want if they are paying the claim, it would not matter. We will get notice of controversions in cases where they are continuing to pay. They just want to clarify various issues that have arisen.

Q. In that situation where the employer has chosen to make voluntary payments and admits that the accident occurred during the course and scope of the employment, and the man is receiving

treatment, the only way that a formal award can be entered is with the claimant's own agreement; is that right?

A. No.

With the interested parties asking for an award consenting to the issuance of an award.

Q. Right.

So that would include --

A. The claimants have to agree to that. Yes.

Q. Can you give me some idea of what percentage of longshore cases compensation is initiated by the employer voluntarily without any informal or formal hearing?

MR. SOVEL: Objection. I think it has to be, certainly, within his own experience, not beyond.

THE WITNESS: You mean, just by my district office?

BY MR BUCHHOLZ:

Q. In your district?

A. I am roughly going to give you figures. Right now I have about 1800 files open, active, of which over 400 are being paid compensation.

We, in the past year -- in fact, we just did our quarterly review and analysis two days ago. I believe we have held 230 conferences this fiscal year so far which is in nine months.

No. I'm sorry. 99 conferences this year. Really, I would say, 90 to 95 per cent of the cases don't require informal proceedings or formal hearings.

Q. In those cases where the employer does not have a basis to controvert, the employer files a 206 form with the Department of Labor?

A. Yes.

MR. SOVEL: I will object to that because there is a legal conclusion in the use of the term basis for controversion.

MR. BUCHHOLZ: Okay.

BY MR. BUCHHOLZ:

Q. He files a Form 206?

A. We require a 206 form in cases where they are voluntary payments.

Q. Once a Form 206 report is on file with the Department of Labor, what if anything does that trigger within the Department of Labor?

A. Well, it triggers several things; one, when we jacket a case file, which is a file being made up for our review, we only jacket lost time cases. We do not jacket no lost time cases.

If a no lost time case would be jacketed, if we felt there would be permanency at a later date, such as a partial amputation or something, of a finger, we then send informational letters out. The first thing we will do is put in a request for information if it is not there. If we have the 206 received indicating payments are being made, the time frames are checked for accuracy. We make sure that that employer is paying within the proper time frame. The compensation rate is checked, as opposed -- it is mathematically checked, two-thirds of the average weekly wage. If there is a low average weekly wage, we will send an informational letter to the claimant advising him about how to compute an average weekly wage. The case file will be marked with a C indicating that that case file is presently in compensation

status. Then we will start triggering a review for request for medical.

We will also put in our call, possibly, a referral for rehabilitation. So, the 206 is an important function that we can keep. And we do keep track of the cases being compensated in the office. That's one of the requirements on the monthly report.

Q. If an employer chooses to initially controvert a claim, the first step thereafter is an informal hearing; is that right?

A. No.

The first step would be for the employer to provide us with a form called a 207, notice of controversion.

In that form they specifically tell the claimant why they are not paying. That form is sent, transmitted directly to us at that point, and we transmit it directly to the claimant with a letter instructing him what the next step is.

If he is going to controvert -- if he is going to make a claim for compensation, he is to contact our office. We will provide him with the forms.

Then we will get involved with the case. So, the notice of controversion comes in. It goes right out to the claimant. The case file is marked.

Every case where we receive a controversion notice is jacketed, whether it is lost time or no lost time.

Q. Then you will set up an informal hearing?

A. If, again, -- overall, a lot of the notices of controversion which we get do not require informal conferences because the problem was the fact that the claimant was not providing the medicals. They couldn't get the information. The wage information was not received.

So, I would say, we would get, maybe, 60 notices of controversion a month.

But realistically, they are being filed as a protective measure by some employers because they cannot get information that they can begin the payments within 14 days. And they do this.

Q. Then, the majority of those cases would get resolved without even an informal hearing?

A. Yes.

You take a jurisdictional dispute where an an employer is protecting themselves -- it may be a state case that they want to make sure that they run the statute under the Longshore Act. They will initiate payments under the statute, report it to the state. They will also file a 202 with us and raise a jurisdictional defense on a 207. We will jacket that case file and serve it on the employee with specific instructions as to what he is to do.

If he does not respond to that, his case file will be closed in four months.

Q. If, in fact, you go to an informal conference with an employer and employee, it is a step down the road of a controversy?

A. It is beginning -- technically, it is called a prehearing conference.

Q. Right.

A. Almost a last step of the informal proceedings.

Q. Right. No orders or awards are issued our of that informal hearing, are they?

A. As a result of it, they can be.

Q. Not --

A. If the parties agree.

Q. An award can be issued?

A. Well, if the parties agree and request an award, they are given specific instructions. We will even hand them the stipulation of fact form to submit at which time we would issue an award, if appropriate.

Q. Okay.

A. As a result of the informal conference.

But the memorandum of informal conference would indicate that this is the next step. The parties are going to apply for an 8I(a) settlement, or that the parties are going to submit stipulations and request the formal award, or the parties are going to just pay voluntarily.

Q. In this particular case with Mr. Cummings, you said the 206 report was initially received by the Department of Labor when?

A. The first one?
Q. Yes.
A. June 18.
It is stamped on the back, 1979.
Q. Is a copy of that required to be sent to the claimant?
A. By the employer.
The instruction on there is that the notice be sent to the deputy commissioner, copies to be sent to the person who is receiving compensation.
Q. When that 206 report was received by the Department of Labor, that would have triggered setting up a file and beginning to monitor this matter; is that right?
A. Well, that's what they did in New York.
Q. Did you also receive a 204 report in this case?
MR. SOVEL: A what?
MR. BUCHHOLZ: 204.
A. That would be an attending physician's report.
I believe there are -- yes. There are 204's in here.
BY MR. BUCHHOLZ:

Q. Can you tell me when the first one was received?
A. July 18, 1979, from Dr. Frank Mattei, dated July 11, 1979.
Q. Since you had already received the 206 report, did the subsequent receipt of the 204 report trigger any additional activity?
A. We medically monitored the case.

If an additional clarification was needed, whatever action we -- again, the 204 is really the medical aspects of the case. A doctor could submit a narrative that would suffice if he covered all the information we are looking for.
Q. You say that there was no -- and I put this in quotes -- "formal award" earned in this case; is that right?
A. To my knowledge, no. There was none.
Q. In what percentage of cases, in your experience, are "formal awards" as set forth in these regulations issued?
A. I would take a rough estimate of 5 per cent would be high.

MR. BUCHHOLZ: I don't have any other questions.

BY MR SOVEL:

Q. With respect to the issuance of formal awards, these are sometimes done with respect to the awarding of scheduled lost benefits under Section 8 of the Act?

A. Yes. Some.

It depends on the employer. Some employers, when they get a final resolution, will request an award. Normally, when we get to the permanent partial disability aspect of a case -- and I will clarify that -- we have an injured employee who is temporarily totally disabled for a period of time. He then returns to work. Normally, we have a regular process where we, in monitoring the cases, will request what is called a PPI examination. If it is a potential case -- in other words, if it is a fracture of one of the members covered under the schedule, we will request this. The report would come in. The contact by the employer with the claimant or the claimant's representative would indicate they accept the rating provided by the examining physician. They they would draw up a stipu-

lation to the fact and request an order. Some employers will do this.

What they are getting is an award that is final in 30 days. And the claimant has one year to apply for modification. Other employers will elect not to -- they will simply voluntarily pay this compensation.

The key thing there is that with the order, the award is final in 30 days, period. And the claimant has a year to apply for a modification.

If it is a voluntary payment, and if the claimant has filed a formal claim for compensation, you know, he has no statute problems. The case is unadjudicated formally.

Q. So he can reopen it or come in at any time in the future?

A. Yes, he can.

Q. Then, certain employers as a matter of policy request awards under those circumstances?

A. In some cases, yes.

Q. You issue those awards?

A. If it is appropriate with the evidence in the case file and we have the appropriate stipulations, yes.

MR. SOVEL: Thank you.

(Whereupon the deposition was concluded at 10:50 a.m.)

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